

U.S. Department of Labor

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Issue Date: 31 July 2006

CASE NO: 2005-DCW-3
OWCP NO: 40-112078

In the Matter of:

JESSE J. LOPEZ,
Claimant,

v.

WASHINGTON POST,
Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,
Carrier.

Appearances: Jesse J. Lopez,
Pro Se

Thomas C. Fitzhugh III, Esquire
For the Employer

Before: Edward Terhune Miller
Administrative Law Judge

DECISION AND ORDER AWARDING MEDICAL BENEFITS

This proceeding involves a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901, *et seq.*, as extended by The District of Columbia Workmen's Compensation Act ("DCCA"), 36 D.C. Code § 501 *et. seq.*¹ The law

¹ All cited regulations refer to Title 33, United States Code, unless otherwise indicated, and are cited by part or section only. Employer's motion for summary decision, dated February 13, 2006, was denied this tribunal's order on March 21, 2006 because of disputed material facts. The evidentiary record was held open until March 31, 2006, but no further evidence was submitted and neither Claimant nor Employer filed a closing brief. To the extent pertinent, this tribunal has considered and referred to Employer's brief in support of its motion for summary decision. The exhibits submitted by each party are not all numbered. As a result, the exhibits will be described

applies to all claims for injuries or deaths based on employment events in the District of Columbia that occurred prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act. Jesse J. Lopez ("Claimant") is seeking medical benefits from the Washington Post ("Employer") and Liberty Mutual Insurance Company ("Carrier") due to work-related injuries on November 7, 1976, and April 19, 1978 to Claimant's back which he alleges caused his left knee to require replacement surgery.² Disability compensation is not in issue.

Claimant filed an earlier claim seeking compensation and medical benefits. On February 5, 1979, Administrative Law Judge Philip J. Lesser found Claimant disabled due to work-related back and left shoulder injuries, awarding compensation and medical benefits. Judge Lesser ordered that Employer pay Claimant temporary total disability for the period from November 10, 1976 to December 25, 1977, a twenty percent permanent partial disability for the period from December 26, 1977 to April 19, 1978, and permanent total disability for a period of 104 weeks commencing April 20, 1978. Thereafter, Judge Lesser awarded Claimant compensation for permanent total disability to be paid by the Special Fund, established under Section 44 of the Act. Therefore, Employer argues that Claimant has already been compensated for the back and left shoulder injuries. Employer further argues that Claimant's knee problem is a genetically-driven condition, unrelated to his back and left shoulder injuries.

ISSUES

1. Is the medical causation of Claimant's non-employment related left knee condition so related to his employment related injuries that he is entitled to medical benefits consisting of required left knee replacement?

FINDINGS OF FACT

Employer concedes that Claimant sustained the following injuries due to work-related accidents: an injured left shoulder on September 9, 1973, an aggravation of the left shoulder injury on September 4, 1974, a lower back injury on November 7, 1976, and an aggravation of the back injury on April 19, 1978. Employer Motion for Summary Decision ("Emp. Mot.") at 3. Also, Judge Lesser made these findings of fact with regards to the dates that Claimant sustained the above-mentioned injuries. *Lopez v. Washington Post*, 78-DCWC-209, 78-DCWC-322, at 3-5 (ALJ February 9, 1979); Ex 2 to Emp. Mot. As a result, this tribunal finds that Claimant sustained work-related injuries on the above-mentioned dates. Employer also concedes that the parties are subject to the Act and that Claimant and Employer were in an employee-employer relationship at all relevant times. Employer's Form LS-18.³

when they are not numbered. No formal hearing was held. By agreement of the parties, this decision was made on the documentary record.

² In his Form LS-18, dated March 30, 2005, Claimant requested that his left knee replacement surgery be paid for under the Act. He did not make a claim for compensation, only medical benefits. Therefore, compensation is not at issue in this case.

³ Because Claimant is *pro se*, no pretrial stipulations were agreed upon by the parties. However, in the Form LS-18 submitted by Employer, it made concessions as to coverage under the Act and the employee-relationship at the time of the alleged injuries, which are not disputed by Claimant.

Testimonial and Non-Medical Evidence

1. Deposition Testimony of Jesse J. Lopez

Claimant gave a deposition on November 2, 2005. Ex. 1 to Emp. Mot. Claimant testified that his normal employment with Employer included lifting stacks of newspaper weighing approximately 20 pounds. *Id.* at 7. He testified as to his work-related injuries.

Claimant stated that he injured his left shoulder on September 9, 1973 after falling into a round, marble, wash basin. *Id.* at 8. He testified that he did not recall aggravating his left shoulder while trying to bundle papers on September 4, 1974, but stated that he remembered “injuring myself [Claimant] several times in different areas.” Claimant stated that he missed six months of work due to a shoulder injury. *Id.* at 9. He testified that he received ten stitches in his head after hitting his head on a metal bar. *Id.* at 10. Claimant stated that he did not remember injuries on November 7, 1976 and April 19, 1978, but that he aggravated his back at some point.

Claimant was asked whether he had knee injuries while working for Employer. *Id.* at 11. He testified that he fell on his hands and knees at some point a long time ago. Claimant noted that he had walked with a limp for 30 years. He said his knee bothered him since approximately 1977 or 1978 and that he complained to Dr. Azer about it.

Claimant stated that at the time he was being paid by the Special Fund. *Id.* at 13. He testified that his current claim was for medical benefits, not compensation. He said that Dr. Azer treated his toes, legs, knees, and mostly his left shoulder. *Id.* at 16. Claimant stated that he moved to Texarkana, Texas, where he saw Drs. Sharma and Pappas for pain management. *Id.* at 17, 22. He testified that Dr. Sharma referred him to Dr. Alkire, who replaced his left shoulder. *Id.* at 19. He said that he saw Dr. Buono in Texarkana for his neck and back. *Id.* at 22.

Claimant stated that Dr. Alkire was the doctor who reported that he needed total left knee replacement. He testified that when he moved back to Maryland in 2003 and eventually Virginia in 2004, he immediately began seeing Dr. Azer. *Id.* at 24, 25. He stated that his knees hurt when Dr. Azer put him through a stress test. *Id.* at 27, 28.

Claimant stated that his regular physician is Dr. Daniels. *Id.* at 31. He testified that he sees Dr. Daniels approximately every six months. He said that Dr. Daniels has not treated his knees. *Id.* at 32. Claimant stated that he has Medicare, but has not tried to have Medicare cover the cost of his knee replacement. He testified that Dr. Azer injected his knees and they felt better as a result. *Id.* at 33.

Claimant said that he believes Employer is responsible for his knee replacement because he has been limping for 30 years. *Id.* at 36. He stated that he received a letter from Liberty Mutual which advised him that Liberty Mutual would pay for his knees, hands, and shoulder. *Id.* at 37. There is a letter from Lisa Baxter, a claims examiner with the District of Columbia’s Department of Employment Services, dated February 2, 2004, confirming that Liberty Mutual “authorizing the treatment you [Claimant] requested,” that is part of the record. He testified that he received a later letter from Liberty Mutual in which it stated that it “would like to see if

something more conservative could be done.” That letter was not entered into evidence. He said that Liberty Mutual sent him to Dr. O’Brien, but that the doctor did not x-ray or look at his knee.

Medical Evidence

1. EMG and Nerve Conduction Velocity Tests conducted by Dr. Daniel R. Ignacio

Dr. Ignacio conducted an EMG and Nerve Conduction Velocity (“NCV”) tests on Claimant dated November 7, 2005. He is board-certified in physical medicine and rehabilitation. He stated that Claimant complained of “chronic pains along the back going down to the buttocks and to the legs, and pains along both knees with numbness and weakness along both legs, more so along the left side.” Dr. Ignacio explained that he conducted nerve conduction studies of Claimant’s “bilateral peroneal, tibial, and sural nerves and analyzed the tibial H-reflexes.” He also conducted an EMG study of “the selected muscles along the lower limbs on both sides, the gluteal and lumbar muscles on both sides.”

Dr. Ignacio made findings based on the NCV and EMG tests. First, he found a “slowing of the peroneal nerve conduction velocities. Second, he found a slowing of the tibial H-reflexes indicative of an S1 nerve root conduction block. Last, he found abnormal EMG study findings “with evidence of chronic denervation in selected muscles along the lower limbs, the gluteal and lumbar muscles on both sides at the L4, L5, and S1 distribution.” Dr. Ignacio concluded that abnormal electrodiagnostic study was consistent with “chronic left L4, and bilateral L5-S1 radiculopathies.” Dr. Ignacio’s findings and opinion were considered and utilized by Drs. Azer and Jackson in reading their conclusions. This information was not available to Dr. O’Brien.

2. Medical Opinions of Dr. Rida N. Azer

Dr. Azer examined Claimant numerous times and wrote medical opinions. He is a board-certified orthopedic surgeon. In his first opinion, dated March 2, 2005, Dr. Azer stated that Claimant reported marked pain in the left and right knees. Claimant told Dr. Azer that he was bearing most of the weight on the right foot. Dr. Azer opined that the left knee showed marked crepitus with knee flexion and extension and patellofemoral compression with synovial thickening. Dr. Azer scheduled patient for surgery for left total knee replacement.

In Dr. Azer’s subsequent medical opinions, dated April 8, 2005, July 1, 2005, and July 15, 2005, September 9, 2005, October 21, 2005, and November 18, 2005, he did not give a diagnosis as to Claimant’s left knee. These medical opinions dealt solely with Claimant’s back and shoulders.

Drs. Azer and Jackson issued a joint opinion, dated March 17, 2006, in which they stated that Claimant sustained a low back injury on November 7, 1976. They opined that Claimant “continues to have chronic low back pain associated with pain radiating down the buttocks to both legs, greater in the left leg.” Upon physical examination, they found that Claimant has a left L4 radiculopathy with denervation confirmed by electromyogram (“EMG”) studies, dated November 7, 2005. They opined that Claimant’s radiculopathy “causes sensory loss in this patient’s left leg, weakness of his quadriceps as well as pain syndrome in his left leg.” They

provided an article and stated that their diagnosis regarding radiculopathy was “standard knowledge for any orthopaedic surgeon as indicated in the attached article.”⁴ They attached the article to demonstrate that “[t]his is standard knowledge for any orthopaedic surgeon.”

Drs. Azer and Jackson opined that Claimant’s weakness in his left leg is due to his nerve injuries sustained from his low back injury in 1976, which produced an antalgic abnormal gait. They also stated that this antalgic gait has accelerated degenerative changes in his left knee. Specifically, the weakness which caused the gait caused Claimant multiple falls, in their opinion producing occult osteochondral injuries, which accelerated the wear and tear on his left knee. The source of their information regarding the alleged falls was unclear. Further, Drs. Azer and Jackson stated that “the constant weakness producing this antalgic gait causes more medial compartment loading, worsening varus deformity of the knee.” According to them, if the varus deformity of his left knee was totally genetically driven, then the varus deformity in the right knee should be the same as his left knee, which it is not.

Drs. Azer and Jackson stated that Dr. O’Brien’s position is an argument without proof or fact. They opined that Claimant’s right knee does not have the same degree of varus deformity and degeneration and noted that total knee replacement has not been recommended for his right knee. They stated that the reason Claimant’s left knee is worse is the confirmed radiculopathy which produces weakness, in turn producing the gait derangement causing increased medial compartment loading. As a result, Claimant has increased varus deformity in his left knee as compared to his right knee to the point where total left knee replacement was a reasonable treatment option.

3. Medical Report of Dr. Hampton J. Jackson, Jr.

Dr. Jackson examined Claimant and wrote a report, dated November 11, 2005. Ex. 3 to Emp. Mot. Dr. Jackson is a spinal surgeon. He is board-certified in orthopedic surgery.⁵ He stated that Claimant was referred to him from Dr. Azer early in the year. Dr. Jackson noted that Claimant complained of worsening leg and back pain. He opined that Claimant had “chronic denervation in the paraspinals at L4, L5, and S1.” He stated that there were changes at L4-5 “with an adjacent disc syndrome with definite malalignment with collapse of the disc.”

He wrote that Claimant complained of worsening symptoms in his left knee. Dr. Jackson explained to Claimant that “part of the pain he feels is referred to his knee and another part is due to the back condition for the last 27 years.” Dr. Jackson noted that Claimant has had an accelerated degeneration of his knees because of an antalgic⁶ gait, especially on the left side. He opined that the degeneration is faster “on the left side than on the right side and the condition of his left knee is secondarily related to this longstanding back condition.”

⁴ The article, entitled *Lumbar Radiculopathy: Proper Diagnosis Key to Effective Treatment*, authored by Alta Skelton, a registered nurse, is available at the following website: <http://www.spineuniverse.com/displayarticle.php/article2760.html>.

⁵ Board-Certification is reflected in the listings by the American Board of Medical Specialties (“ABMS”) at abms.org. Judicial notice has been taken of these resources if the qualifications of the physicians are not otherwise of record. See *Maddaleni v. Pittsburg & Midway Coal Co.*, 14 BLR 1-135 (1990).

⁶ Antalgic is understood by this tribunal to mean “counteracting or avoiding pain, as a posture or gait assumed as to lessen pain” as indicated by *Dorland’s Pocket Medical Dictionary* (23d ed. 1982).

Dr. Jackson suggested that back surgery was not a good idea for Claimant. Instead, he recommended a pain management specialist for Claimant's back and secondary neck conditions. He stated that Claimant would benefit from physical therapy to his lower back in conjunction with pain management measures. *Id.* at 2.

Dr. Jackson authored subsequent medical opinions, dated March 10, 2005, June 14, 2005, and August 18, 2005, but did not give a diagnosis as to Claimant's left knee. These medical opinions dealt solely with the condition of Claimant's back.

4. Medical Opinions and Deposition Testimony of Dr. Michael B. O'Brien

Dr. O'Brien examined Claimant and wrote a report dated December 29, 2004. Ex. 5 to Emp. Mot. He is a board-certified orthopedic surgeon. Dr. O'Brien was provided with medical records and a set of MRIs provided by Claimant. He stated that Claimant's only complaint was his left knee.

Dr. O'Brien discussed the medical records provided to him. A report by Dr. Sharma indicated that Claimant had knee pain in November 2002, for which he received moist heat treatment. Dr. Knight reported that x-rays of Claimant's knees, taken May 20, 2002, showed osteoarthritis. *Id.* at 2. Dr. O'Brien also reviewed medical records from Dr. Azer. Those records showed that Claimant had recently had an injection in his left knee, which was improving. Dr. O'Brien opined that the MRIs included in Dr. Azer's records demonstrated arthritic conditions in both knees. He stated that arthrocentesis of both of Claimant's knees were done on July 9, 2004. Dr. O'Brien reviewed an MRI of Claimant's left knee, dated February 5, 2004, which indicated "significant degenerative joint disease, narrowing of the medial compartment, and some effusion." *Id.* at 3.

Dr. O'Brien conducted a physical examination. At the request of Claimant, he examined only the left knee. Dr. O'Brien opined that Claimant has "a varus deformity with quite a bit of crepitus on exam." *Id.* at 3, 4. He stated that Claimant demonstrates "reasonably full extension and flexes to about 115 to 120 degrees" with no gross instability. *Id.* at 4. Dr. O'Brien reviewed Claimant's x-rays, finding significant medial compartment degenerative joint disease ("DJD"), worse in the left knee than in the right.

Based on his examination, Dr. O'Brien opined that Claimant would be a reasonably good candidate for left knee replacement. He stated that "whether or not this has anything to do with any accident, of course, is unknown." Dr. O'Brien continued:

The patient himself today states that this is not related to any accident so I am not sure what report I am supposed to produce. The patient clearly has longstanding DJD. This has nothing to do with an accident according to the records present. I cannot comment on his hands, shoulders or other knee as these were not examined.

Dr. O'Brien gave a deposition on May 10, 2005. Ex. 4 to Emp. Mot. He said that he examined Claimant's left knee only on December 29, 2004. *Id.* at 5. Dr. O'Brien stated that he

reviewed Claimant's medical records from Drs. Galletti, Alkire, Sharma, Wren, Azer, Knight, and Likover. *Id.* at 5, 6. He testified that the medical records indicated that most of Claimant's medical problems concerned his back and shoulders. *Id.* at 6. He agreed that the medical records relating to knee problems seemed to be from the few years before his examination.

Dr. O'Brien opined as to the condition of Claimant's left knee. He stated that Claimant's left knee had a "varus deformity," meaning that it is crooked towards the inside, a condition that is frequently genetically driven. He testified that Claimant had "quite a bit of crepitus, which means crunching, which goes along with the diagnosis of osteoarthritis." Dr. O'Brien opined that Claimant had a fairly good range of motion and did not have any gross instability. He stated that Claimant's motor and sensory, or neurovascular, examination was normal. He testified that Claimant had quite a bit of degenerative arthritis in both knees, but worse in the left knee. *Id.* at 7.

Dr. O'Brien said the cause of osteoarthritis is "years and years of wear." He was told that Claimant believes his need for a knee replacement is caused by thirty years of limping. Dr. O'Brien testified that he was not aware of any orthopedic literature to support the idea that limping could cause or accelerate varus deformities and then severe DJD. *Id.* at 7, 8. He stated that he often treats patients who need total knee replacements. *Id.* at 8. He opined that Claimant's left knee is a typical knee replacement needed from degeneration over time.

Dr. O'Brien authored a second opinion, dated November 29, 2005, after reviewing Dr. Jackson's November 11, 2005, medical opinion. Ex. 6 to Emp. Mot. Dr. O'Brien did not conduct a physical examination in connection with his second opinion. Dr. O'Brien reported that Dr. Jackson opined that Claimant's knees "bilaterally have accelerated from a DJD standpoint because of his antalgic gait." Dr. O'Brien also stated that Dr. Jackson made "an unusual statement in that somehow the left knee had accelerated degenerative more so than the right because the patient I guess listed a bit more to the left." According to Dr. O'Brien, Dr. Jackson's statement did not make any sense.

Dr. O'Brien opined that Claimant had longstanding DJD, which was unrelated to his back injury. Further, he stated:

The vast majority of osteoarthritis is genetically driven and, of course, if the patient had multiple injuries to his left knee one could state that those injuries caused significant osteoarthritis. To simply state that the patient has back pain and walks funny and that was the major source of his arthritis is absurd.

DISCUSSION AND CONCLUSIONS OF LAW

Injury Arising Out of and In the Course of Employment

Claimant bases his claim for medical benefits under the Act on accidents that occurred while working for Employer on November 7, 1976, and April 19, 1978. The evidence Claimant offers in support of his case consists of his testimony, as well as medical opinions authored by

Drs. Jackson and Azer and the diagnostic tests conducted by Dr. Ignacio. Employer offers the medical opinion and deposition testimony of Dr. O'Brien.

Claimant does not allege that his employment-related accidents directly caused the injuries to his left knee. Therefore, the sole legal issue in this case is whether the medical causation of Claimant's non-employment related left knee condition was related to his employment related injuries such that he is entitled to medical benefits for a required left knee replacement. Claimant alleges that his left knee injuries have been accelerated or aggravated as a result of his employment-related accidents. Employer states that Claimant's DJD and varus deformity are not causally related to Claimant's employment-related accidents; instead, they are "genetically-driven" conditions. Emp. Mot. at 4-5. "Section 20(a) . . . provides claimant with a presumption that his injury is causally related to his employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm." *Uglesich v. Steverdoring Servs. of Am.*, 24 BRBS 180, 182 (1991) citing *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). "Where an employment-related injury aggravates, accelerates or combines with a non-work-related infirmity, disease or underlying condition, the entire resultant disability is compensable." *Uglesich*, 24 BRBS 180 citing *Rajotte v. General Dynamic Corp.*, 18 BRBS 85 (1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966).

Section 20(a) of the LHWCA provides, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). However, before availing himself of the Section 20(a) presumptions, a Claimant must establish that the employment events claimed to be the cause of the harm in fact occurred. *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309, 312 (1977); see also *Sewell v. Noncommissioned Officers' Open Mess*, 32 BRBS 127, 128 (1997), *reconsideration denied en banc*, 32 BRBS 134 (1998); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). According to the United States Supreme Court, a *prima facie* case must at least allege an injury that arose in the course of employment as well as out of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982).

The first prong that triggers the presumption set forth under Section 20(a) is whether the Claimant actually suffered harm to his left knee. Drs. Jackson, O'Brien, and Azer all agree that Claimant has an injured left knee. Dr. Jackson stated that Claimant had knee degeneration on the left side. Dr. O'Brien opined that Claimant had "varus deformity with quite a bit of crepitus on exam." Ex. 5 to Emp. Mot. He also found that Claimant had significant medical compartment DJD, worse in the left knee, such that Claimant would be a good candidate for left knee replacement. *Id.* Dr. Azer, in his joint opinion with Dr. Jackson, agreed that Claimant had accelerated degenerative changes in his left knee due to an antalgic gait. Therefore, the medical evidence demonstrates that Claimant has suffered harm to his left knee.

The second condition that must be satisfied to avail Claimant of the Section 20(a) presumption is that working conditions must have existed or an accident must have occurred which could have caused, aggravated or accelerated the harm. In this case, to avail himself of

the Section 20(a) presumption, Claimant must show that his accidents could have caused, aggravated or accelerated his left knee injury.

Employer does not dispute that Claimant sustained left shoulder injuries on September 9, 1973 and September 4, 1974 and lower back injuries on November 7, 1976, and April 19, 1978. Emp. Mot. at 3. However, Employer argues that Claimant's left knee injuries, varus deformity and DJD, are "genetically-driven and that there is no credible medical link between them and the 1978 back injury." *Id.* at 6. The physician opinions of Dr. Jackson and Dr. Azer, submitted by Claimant, state that Claimant's left knee condition was accelerated by his previous back injuries. Therefore, the legal issue is whether there is sufficient medical evidence that Claimant's back injuries aggravated or accelerated his left knee condition to establish a causal nexus.⁷

The medical opinions of Drs. Jackson and Azer are reasoned. They rely upon objective medical tests, such as Dr. Ignacio's EMG studies, as well as appropriately comprehensive physical examinations in determining that Claimant's low back pain caused him radiculopathy, which produced an antalgic gait. They opined that this abnormal gait accelerated degenerative changes in his left knee. Both physicians are qualified with respect to their opinions. Dr. Jackson is a spinal surgeon, while Dr. Azer is an orthopedic surgeon. Their diagnoses were limited to Claimant's back and knees, such that Drs. Jackson and Azer did not give opinions outside their fields of expertise. They do base some of their conclusions as to causation based on alleged falls by Claimant that are unsubstantiated. However, their opinions are probative and convincing because they are reasoned and based on objective medical evidence. Therefore, this tribunal finds that Claimant fulfilled the second condition of the Section 20(a) presumption, in that he established his work-related lower back injuries on November 7, 1976, and April 19, 1978 could have accelerated the harm to his left knee. *Uglesich*, 24 BRBS 180, 182 citing *Blake*, 21 BRBS 49. This tribunal also finds no evidence that Claimant left shoulder injuries of September 9, 1973 and September 4, 1974 have caused his left knee injury because there is no medical evidence in support of that conclusion. As a result, Claimant is entitled to the presumption created under Section 20(a) only with regards to his lower back injuries.

If a *prima facie* case is established, the presumption is created under Section 20(a) in a case such as this that the employee's injury arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *Noble Drilling v. Drake*, 795 F.2d 478 (5th Cir. 1986); *E & L Transport Co. v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Dr. O'Brien's opinions and deposition as to whether Claimant's left knee condition was accelerated by his work-related injuries were less convincing than the opinions of Drs. Jackson

⁷ Because there is no evidence in the record that any of Claimant's accidents *directly caused* the injuries to his left knee, this tribunal has only examined whether the accidents "aggravated or accelerated the harm" to that knee. *Uglesich*, 24 BRBS 180, 182 citing *Blake*, 21 BRBS 49.

and Azer for a few reasons. Dr. O'Brien, while noting that Claimant's left knee injury are due to "years and years of wear," does not explain why back injuries and shoulder injuries could not have accelerated the degeneration of Claimant's knee, particularly since Dr. Jackson and Azer opined that the nature of the back injury would have put greater stress on the left knee than the right. Dr. O'Brien authored his November 29, 2005, medical for the purpose of rebutting Dr. Jackson's conclusions after reviewing his diagnoses. Dr. Jackson's conclusions are based on legitimate premises and supported by objective medical evidence, such as Dr. Ignacio's EMG studies. However, Dr. O'Brien's rebuttal is conclusory in that he fails to adequately explain why Claimant's back injuries could not have accelerated Claimant's left knee condition. He stated that he was unaware of any orthopedic literature supporting the idea that limping could cause or accelerate varus deformities and severe DJD and referred to Dr. Jackson's diagnosis as "absurd." Ex. 6 to Emp. Mot. Dr. O'Brien cited no objective medical evidence related to his diagnosis of Claimant to support this position.

Dr. O'Brien's criticism of Dr. Jackson's diagnosis also does not fully appreciate Dr. Jackson's conclusion. According to Dr. O'Brien, Dr. Jackson opined that Claimant's knees "bilaterally have accelerated from a DJD standpoint because of his antalgic gait." While Dr. Jackson did make this statement, he also explained that Claimant had left L4 radiculopathy with denervation, confirmed by Dr. Ignacio's EMG studies, and that these nerve injuries in Claimant's left low back caused weakness in his left leg, which accelerated degenerative changes in his left knee. In reviewing Dr. Jackson's diagnoses, Dr. O'Brien did not discuss the extent to which radiculopathy might have affected Claimant's left knee. In fact, Dr. O'Brien did not give an opinion as to whether low back nerve injuries could cause damage to Claimant's legs and knees, as suggested by Dr. Jackson and Dr. Azer, and thus did not effectively contradict that conclusion. Also, because, at Claimant's request, Dr. O'Brien only examined Claimant's left knee, the scope of his assessment appears to have been restricted.

Drs. Azer and Jackson opined that if the varus deformity of his left knee was totally genetically driven, as Dr. O'Brien diagnosed, then the varus deformity in the right knee should be the same as his left knee, which it is not. In fact, all three doctors agree that Claimant's left knee is in worse condition than his right knee. Dr. O'Brien's opinions and deposition did not address the reason that Claimant's left knee condition was worse than the condition of the right knee.

Because the opinions of Drs. Azer and Jackson are more credible, more complete, and based on extensive objective evidence tests and their assessment of those tests, in contrast with than Dr. O'Brien's opinions and deposition, Employer has not rebutted the Section 20(a) presumption in that it failed to present substantial evidence proving the absence of or severing the connection between Claimant's harm and employment conditions. Furthermore, Claimant has met his burden of proving by a preponderance of the evidence that his left knee condition was accelerated or aggravated over time by his November 7, 1976 and April 19, 1978 lower back injuries.

Medical Costs

Under § 904(a), “[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USC §§ 907, 908, 909].” Section 907 states that “[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.”

Because Claimant proved that his left knee injury was accelerated or aggravated by his work-related lower back injuries, under § 907, he is entitled to medical costs for the left knee injury.

ORDER

The claim of Claimant, Jesse J. Lopez, for benefits under the Act is granted. Employer, Washington Post, and Carrier, Liberty Mutual Insurance Company, shall pay to Claimant all medical expenses for care and treatment of Claimant’s left knee, including the knee replacement, to which he is entitled under the Act.

A

Edward Terhune Miller
Administrative Law Judge